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IN THE

Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,

Petitioner,

v.

JOHN A. CARDEGNA AND DONNA REUTER,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICI CURIAE* FLORIDA BANKERS ASSOCIATION AND AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Florida Bankers Association ("FBA") is a voluntary organization of financial institutions doing business in the State of Florida. FBA regularly represents the interests of its members before all branches of government and frequently appears as an *amicus curiae* in the state and federal courts, including, on several occasions, before this Court. The issue in this case is of particular importance to FBA and

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

its members because arbitration agreements are a significant way in which FBA members attempt to promote the efficient and inexpensive resolution of disputes. By undermining the application and enforceability of arbitration clauses, the decision below, if allowed to stand, will impose greater costs and greater uncertainty upon FBA's members.

Amicus curiae American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. ABA has members in each of the fifty states and the District of Columbia. ABA member banks hold approximately 90% of the domestic assets of the banking industry in the United States. ABA frequently appears in litigation as a party or *amicus* where issues raised in a case are of widespread importance and concern to the industry. The issue in this case is of precisely such importance and concern to the banking industry because the decision below and others like it threaten to undermine the tremendous benefits of arbitration agreements used in the banking industry and to divert numerous disputes into the more expensive and less efficient state-court system.

SUMMARY OF ARGUMENT

1. Arbitration agreements occur in numerous and diverse contracts across all aspects of the United States economy. Their consistent and certain enforceability is thus of great national importance and has the potential to affect a tremendous amount of economic activity. The particular issue in this case – whether claims of contract invalidity not specifically related to the arbitration agreement are to be decided by the court or the arbitrator – likewise arises in connection with numerous contracts, based on many different claims of illegality, and across multiple and varied industries. This case thus has far broader significance than just to the parties themselves; it affects the banking industry and other industries throughout the country. The petition thus presents an issue of national importance warranting this Court's attention.

2. In order to give proper effect to federal law protecting arbitration agreements, such agreements must be treated as severable from the agreements to which they relate and their validity must be analyzed independently from the validity of such underlying contracts. The decision below instead conflated the issue of underlying contractual validity and arbitration-agreement validity thus nullifying arbitration agreements in many contexts. And it did so out of a seeming hostility to arbitration that is diametrically contrary to federal policy.

ARGUMENT

Amici agree with petitioner that the decision below is part of a clear and irreconcilable split between state supreme courts and federal circuit courts, that it creates an intolerable inconsistency within Florida itself given its divergence from Eleventh Circuit case law, and that it applies a fundamentally incorrect legal rule that conflicts with both the letter and the purposes of the Federal Arbitration Act ("FAA").

Rather than belabor matters already well-articulated by petitioner, *amici* will focus on why this case is important and deserving of this Court's limited time and attention, and will briefly expand upon the important principle of severability of arbitration clauses and how state-court disregard for that principle manifests an impermissible hostility toward arbitration.

I. THE PETITION RAISES AN IMPORTANT AND RECURRING ISSUE AFFECTING NUMEROUS TRANSACTIONS IN A BROAD ARRAY OF INDUSTRIES.

Arbitration agreements appear in a wide variety of contracts in the banking and other industries. Those underlying contracts are often the target of claims of illegality having nothing to do with the arbitration clauses themselves but that, under the decision below, would effectively nullify the agreement to arbitrate. While the petition highlights the existing split with cases primarily involving so-called pay-day

lending agreements, the importance of the issue presented goes far beyond that particular business area and covers a tremendous range of banking and other activities.

A. The Arbitrability of Claims of Contract Illegality Affects a Broad Range of Transactions Across Multiple Industries.

As this Court is certainly well aware, arbitration clauses appear in an extensive array of contracts involving a myriad of goods and services. *See, e.g.*, *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444, 447 (2003) (home improvement loan agreement); *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 53 (2003) (commercial construction debt restructuring agreement); *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 109 (2001) (employment agreement); *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 82 (2000) (mobile home financing and insurance agreement); *Wright* v. *Universal Maritime Service Corp.*, 525 U.S. 70, 72 (1998) (longshoremen's collective bargaining agreement); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995) (securities brokerage account agreement); *Allied-Bruce Terminix Companies, Inc.* v. *Dobson*, 513 U.S. 265, 268 (1995) (termite control contract); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (registered securities representative registration/employment agreement); *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 470 (1989) (construction contract); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616-17 (1985) (automobile manufacturer distribution and sales agreement); *General Atomic Co.* v. *Felter*, 436 U.S. 493, 494 (1978) (uranium supply agreement); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (paint manufacturing and sales consulting agreement). It is the widespread use of arbitration agreements, and the strong federal policy favoring such agreements, that has led to this Court's justifiably frequent grant of certiorari in arbitration cases.

In the banking area, in particular, arbitration clauses appear in savings and checking account agreements, home loan agreements, auto loan agreements, personal loan agreements, credit card agreements, and various ancillary investment and other agreements entered into between banks and consumers. In one study of consumer-initiated arbitration, for example, 90% of the arbitrations reviewed were related to consumer lending in one form or another, and of those arbitrations, 75.2% were related to the banking industry, including claims regarding insurance linked to credit cards, savings and checking account transaction disputes, disputes over credit card charges, interest rates, and payments, mortgage lending disputes, and other claims involving financial services. Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* 7-8 (2004).[2]

Such arbitration agreements are of great value to the banking industry as well as to consumers. Indeed, the Ernst & Young study found that arbitration in the consumer lending context had recognized advantages over litigation in connection with outcomes, process, costs, and timeliness. *Id.* at 2. The study further found that consumers prevailed more often than businesses in cases that went to an arbitration hearing, consumers prevailed close to 80% of the time when pre-hearing settlements were taken into account, and that nearly 70% of the consumers surveyed were either satisfied or very satisfied with the arbitration process. *Id.*

The widespread use of arbitration agreements in the banking industry and elsewhere in the economy, and this Court's frequent consideration of cases involving the FAA, amply attest to the national importance of the uniform and certain treatment of cases under the FAA. The decision below

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[2]Available at http://www.ey.com/global/download.nsf/US/-Outcomes_of_Arbitration/$file/OutcomesofArbitrationAnEmpirical-Study.pdf.

threatens such uniformity and certainty and is thus a proper and useful subject for this Court's plenary review.

B. The Issue Presented Arises Frequently and Has Spawned Conflict and Confusion in the Courts.

Given the frequent and widespread use of arbitration clauses, it should come as no surprise that the specific issue raised by the petition likewise arises in numerous cases and spawns conflicting results and rules among the lower courts. Contracts containing arbitration clauses are frequently subject to claims that the underlying contract is illegal for some alleged substantive conflict with law or public policy that has nothing to do with the arbitration clause itself. Under the decision of the Florida Supreme Court below, such claims when brought in state court would automatically supercede the arbitration clause and be resolved by the court rather than the arbitrator. In the federal courts, such claims would properly be left to the arbitrator in the first instance.

The petition notes the split between the decision below and six federal circuit courts of appeals. *See* Pet. 2, 9-10. The majority of the cases identified as part of the split arose in the precise same context – pay-day lending – and involved the precise same claim of illegality – alleged violation of usury laws – at issue in the decision below. But that exposition of the conflict is just the tip of the iceberg.

Numerous other cases in a variety of business contexts likewise have divided on the issue of whether claims of illegality and voidness based on the non-arbitration provisions of a contract should be resolved by the court or an arbitrator. Indeed, the issue has arisen in connection with, *inter alia*:

- Construction contracts, *John B. Goodman Ltd. Partnership* v. *THF Constr., Inc.*, 321 F.3d 1094, 1096-97 (CA11 2003) (voidness alleged based on performance by an unlicensed contractor; issue to be resolved by arbitrator); *Silver Dollar City, Inc.* v. *Kitsmiller Constr. Co.*, 874 S.W.2d 526, 536 (Mo. Ct. App. 1994) (alleged voidness or revocability of entire

1994) (alleged voidness or revocability of entire contract; issue to be resolved by court, not arbitrator)

- Energy industry sales contracts, *Mesa Operating Ltd. Partnership* v. *Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 244 (CA5 1986) (voidness alleged based on violation of state regulations for sale of certain gas; issue to be resolved by arbitrator);
- Franchise agreement contracts, *Nature's 10 Jewelers* v. *Gunderson*, 648 N.W.2d 804, 805 (S.D. 2002) (voidness based on violation of franchise law; issue resolved by court and refusal to enforce arbitration provision);
- Securities brokerage account agreements, *Fazio* v. *Lehman Bros., Inc.*, 340 F.3d 386, 394-95 (CA6 2003) (voidness based on alleged criminal embezzlement and fraud relating to the investment accounts; issue to be resolved by arbitrator);
- Intra-business indemnification agreements, *National R.R. Passenger Corp.* v. *Consolidated Rail Corp.*, 892 F.2d 1066, 1070-71 (CADC 1990) (voidness alleged due to conflict with public policy regarding accountability for illegal acts causing injury; issue to be resolved by arbitrator in first instance); and
- Commercial sales and marketing agreements between telecommunications companies, *R.P.T. of Aspen, Inc.* v. *Innovative Communications, Inc.*, 917 P.2d 340, 342 (Colo. Ct. App. 1996) (voidness alleged based on violation of antitrust laws; issue to be decided by court, not arbitrator).

The above are a mere sampling of cases showing that the issue of arbitrability of allegedly void contracts occurs in disputes far beyond the particular context of pay-day lending. Rather, the issue extends across a wide range of industries and contracts and encompasses a multitude of reasons for claiming that the underlying contract is void.

Furthermore, that the split at issue here is primarily one between the federal and state courts, including federal and state courts having overlapping geographic jurisdiction, makes it all the more important for this Court to resolve the issue. As this Court has noted in a slightly different, though fully analogous, context, divergent rules in federal and state courts would "encourage and reward forum shopping," and Congress certainly did not intend "to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984). Allowing lesser respect for arbitration agreements in state court than in federal court "would frustrate Congressional intent to place '[a]n arbitration agreement ... upon the same footing as other contracts, where it belongs.'" *Id.* at 15-16 (citation omitted).

Given the variety of industries, contracts, and claims that would be affected by the decision below and by the split in general, the question presented by the petition is of substantial importance and necessitates this Court's review.

II. THE DECISION BELOW IS ERRONEOUS AND IS AN EXAMPLE OF THE VERY HOSTILITY TOWARD ARBITRATION THAT THE FAA WAS ENACTED TO FORECLOSE.

The decision below incorrectly determined that the severability of arbitration clauses was a matter of state, rather than federal law, and did so out of a seeming hostility to arbitration in general. Such a determination is both incorrect and disrespectful of the supervening federal policy and law favoring arbitration agreements and designed to counter precisely such hostility to non-judicial fora for dispute resolution.

A. Arbitration Clauses Are Severable from the Underlying Contract and May Not Be Challenged by Claims that Do Not Independently Question the Making of the Arbitration Agreement Itself.

Petitioner correctly points out that only challenges to the "making" of the arbitration clause itself, not merely challenges to the contract as a whole, are questions for the court prior to compelling arbitration. Pet. 1-2. The distinction between claims relating to the making of the arbitration agreement (such forgery of a signature or lack of authority or competence to sign at all) versus the alleged substantive illegality of some provision of the underlying agreement having nothing to do with the arbitration clause itself, is amply made in the petition and need not be repeated. What does bear expansion, however, is the issue of severability, only briefly touched upon in the petition itself. Pet. 8-9.

As a matter of federal law, arbitration clauses are deemed to be separate and severable agreements from the underlying contracts in which they may appear. *See Prima Paint*, 388 U.S. at 402-04 (describing the then-existing split on the "separability" or "severability" of arbitration clauses and then siding with the Second Circuit's separability position by holding that, when deciding whether to stay proceedings in order for arbitration to proceed, "the statutory language does not permit the federal court to consider claims of fraud in the inducement of the *contract generally*" "a federal court may consider *only issues relating to* the making and performance of *the agreement to arbitrate*") (emphasis added); *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402, 410 (CA2 1959), *cert. granted*, 362 U.S. 909, *dismissed under Rule 60*, 364 U.S. 801 (1960) (treatment of "the agreement to arbitrate as a separable part of the contract is based not only upon the clear wording of the text [of § 2 of the FAA] but is buttressed by several other pertinent considerations" including the historical treatment of arbitration clauses "as separable parts of the contract").

Such severability means that challenges arising only in relation to some aspect of the contract other than the arbitration provision itself might well render the remainder of the contract illegal or unenforceable, but may not be allowed to undermine the arbitration clause itself. It is only claims that *necessarily* challenge the validity of the arbitration clause (whether or not such claims also challenge the contract as a whole) that are properly decided by the court in the first instance.

For example, a claim that a party never signed the agreement at all, or that his signature was forged, independently challenges the making of the arbitration agreement and would be a proper challenge to such arbitration regardless of what the remainder of the contract said. While such a claim would *also* challenge the validity of a contract as a whole, it is its independent effect on the agreement to arbitrate that matters and acts as a prior deficiency notwithstanding any severance of the arbitration agreement from the remainder of the contract. An unsigned arbitration agreement would be invalid whether viewed in conjunction with or separately from the remainder of the underlying contract. A separate arbitration agreement, however, would *not* be subject to a claim of *usury* or other illegality unrelated to the arbitration clause itself. Where validity turns on some *substantive* defect in the terms or performance of the other parts of the contract, separating out the challenged portion of the contract would indeed leave a valid arbitration agreement.

Such a severability requirement is essential to implementing the policies of the FAA, as this Court recognized in *Prima Paint*. The essential lesson of *Prima Paint* was not related to whether a contract was void or merely voidable, but rather whether the alleged defect in the contract inherently or independently undermined the making of the arbitration agreement itself, *separately* considered on its own terms and not as a mere ancillary part of the contract as a whole.

C. The Decision Below Effectively Nullifies Arbitration Clauses and Places State Hostility to Arbitration Ahead of Federal Law Favoring Arbitration.

By shifting the resolution of claims of substantive illegality to the courts and away from arbitrators, the decision below renders arbitration clauses effectively meaningless in such cases. Even where a court ultimately rejects the claim of illegality, that issue will often have been the primary or sole issue in the case and a subsequent order to arbitrate will either be pointless or worse.[3] The pretense that substantive challenges to the underlying contract somehow call into question the validity of the arbitration clause merges together the very separate questions of substance and *forum*. But those issues are inherently distinct given that claims of substantive illegality could readily be made to an arbitrator and there is no reason to think that arbitrators would be incapable of resolving such claims fairly and expeditiously.

Precluding the arbitration of claims of voidness is doubly problematic in that it not only undermines the use of arbitration, but is done out of an open distrust of the arbitration process itself. Such animus towards arbitration is in direct conflict with the policy of the FAA.

The court below, for example, claimed that it was unwilling to allow an arbitrator to decide the issue of illegality because "Florida public policy and contract law prohibit breathing life into a potentially illegal contract." Pet. App. 7a. But treating arbitration agreements as separate and severable con-

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[3] Should an unsuccessful litigant seek to reassert the alleged illegality before an arbitrator and deny that the prior resolution by the court is binding on the ultimate merits, the defending party will, at a minimum, be forced into the further expense of arbitrating the issues of *res judicata* or law-of-the-case and, if somehow unsuccessful on those issues, could be forced to re-litigate the substantive claim itself. Such a duplication of effort undermines the very purpose of arbitration clauses and the very value that Congress saw in arbitration when enacting the FAA.

tracts would not "breathe life" into the potentially offending remainder of the agreement – not unless you improperly presumed that arbitrators would systematically reach the *wrong* result and tend to uphold illegal contracts. In fact, the concurrence is quite explicit in such improper disparagement of the arbitration process. Pet. App. 11a (Bell, J., specially concurring) ("The state's regulatory authority in the consumer protection area could be severely weakened if predatory lenders are allowed to circumvent the state courts and direct to arbitration claims that their lending practices violate state law."). The notion that state consumer protection will suffer from arbitration necessarily depends on the improperly hostile predicate that arbitrators are either biased or incompetent to decide such issues and will improperly rule against consumers.

Arbitration, however, is presumptively neutral toward state consumer protection and will produce results for or against the consumer depending on the specific merits of each case. (If anything, arbitration seems to be a *more favorable* forum for consumers than the courts themselves, particularly in the consumer lending context. *See supra*, at 5.) If the arbitrator agrees that the contract is illegal, he would rule accordingly and deny the illegal contract any effect. Allowing an arbitrator to reach that decision gives no effect to the illegal underlying contract, but rather properly treats it as severable from the arbitration agreement itself. It is only in the limited scenario where the arbitrator erroneously upholds an illegal contract that Florida public policy is even remotely at risk. But in such circumstances, there are other means of vindicating state policy. For example, the resulting arbitral decision could be challenged in court on the grounds that it requires the performance of some illegal act. *National R.R. Passenger Corp.*, 892 F.2d at 1071.

Florida's unwillingness to allow the arbitrator to make the decision in the first instance thus reflects a wholly unwarranted distrust of the arbitration process and the assumption

that arbitrators will reach the wrong results and somehow skew disproportionately against Florida public policy. Not only is that assumption simply wrong as a factual matter (and unsupported by anything in the Florida Supreme Court's opinion), it is also an impermissible basis for avoiding arbitration as a matter of federal law regardless of how state public policy might fare on average in arbitration.

Given the drastic adverse effect of the decision below on the use and benefits of arbitration, and the manifest hostility toward federal policy displayed by the Florida Supreme Court, it is important that this Court resolve the question presented in the petition and give uniform and certain effect to Congressional policy choices and the commands of the FAA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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